Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1978

No. 77 - 1410

IN THE MATTER OF:
Golden Enterprises, Inc., Bankrupt.

Joe Cagle, Trustee in Bankruptcy for Golden Enterprises, Inc.; Attorneys for the Creditors' Committee; James M. Gaither, Jr., Attorney for Bankrupt; Golden Enterprises, Inc., Bankrupt; William J. Lawing, C.P.A., and Charles B. Camp,
Respondents,

v.

William E. Butner,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Attorneys for Respondents

Joe N. Cagle
Attorney at Law
Cagle and Houck
Fidelity Federal Building
P. O. Box 2050
Hickory, NC 28601
(704) 322-2207

J. Carroll Abernethy, Jr.
Attorney at Law
P. O. Box 1492
Hickory, NC 28601
(704) 322-1060

James M. Gaither, Jr.
Attorney at Law
Gaither and Gorham
NCNB Building
P. O. Box 1650
Hickory, NC 28601
(704) 322-5505

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OPINION BELOW

The order of the Bankruptcy Court (Appendix pp. 2a-20a) is unreported. The opinion of the District Court for the Western District of North Carolina, Statesville Division, reversing and vacating the decision of the Bankruptcy Court (Appendix pp. 21a-30a) is unreported. The opinion of the Court of Appeals, which was delivered on December 8, 1977, is reported as 566 F. 2d 1207, and a copy thereof is appended to Petitioner's Appendix at pp. 31a-43a.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Bankruptcy Judge and the Fourth Circuit correctly apply North Carolina law and Bankruptcy law to the facts of this case?

2. Should the Supreme Court grant certiorari to resolve a split among the Circuits on the issue of competing claims against rental income collected after adjudication of bankruptcy.

STATUTES AND RULES INVOLVED

Rules of Bankruptcy Procedure, Rule 701, 28 U.S.C. 2075

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

STATEMENT OF THE CASE

In lieu of the Petitioner's statement of facts, Respondents contend that the facts as reported in the opinion of the Fourth Circuit are substantially correct (Pet. App. 31a-34a).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Bankruptcy Court and the Fourth Circuit correctly applied North Carolina law and appropriate provisions of the Bankruptcy Act to the facts of this case.

In denying Petitioner's claim the Bankruptcy Judge and the Fourth Circuit correctly ruled that in North Carolina, absent a special provision in the security instrument or an assignment of the rents, a mortgagee must take possession of the mortgaged property in order to claim rental income derived therefrom.[1]

Prior to the adjudication of bankruptcy on February 14, 1975, Petitioner had not taken possession or attempted to take possession of the property by foreclosure or otherwise. He does not claim his lien by reason of an assignment or rents or language in the security instrument. In fact, Petitioner did not want possession during the Chapter XI proceeding because of the severe recession in the Country at that time.[2]

It is true that an agent had been appointed during the Chapter XI proceeding to collect rents and make certain payments therefrom toward the payment of Federal and State taxes, ad valorem taxes, first mortgage payments, and secondary mortgage payments (R. p. 86). But an examination of the order and motion (R. p. 85-87) shows that the rents were not sequestered specifically for Petitioner's benefit such as would have effect after adjudication. Indeed, the Trustee was ordered not to make payments on mortgages after he qualified and the agents duties were terminated (Pet. App. 32a).

Following the rationale of the Eighth and Ninth Circuits, it was incumbent upon Petitioner to take steps to sequester the rents following adjudication (4A Collier on Bankruptcy (14th ed.) pp. 161-163). Had he not had ample opportunity to do so, perhaps equity would intervene to protect him. In this case, however, he was made a party to an adversary proceeding pursuant to Rule 701, et. seq., filed by the Trustee

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1 Gregg v. Williamson, 246 NC 356, 98 SE2d 491 (1957); Kistler v. Development Co., 205 NC 755, 197 SE 413 (1934); Killibrew v. Hines, 104 NC 182 (1889).

2 See Bankruptcy Judges Findings of Fact (Pet. App. 4a-6a).

seeking permission to sell the real estate. He filed no answer (Pet. App. 37a) as other mortgagees did while it was incumbent upon him to do so (Bankruptcy Rule 701).[3] Neither did he ask for a receiver on or sequestration order (Pet. App. 36a-37a).

Finally, the Petitioner purchased the real estate, and his lien was transferred to the proceeds of the sale. The deed from the Trustee which specifically reserved the rents to the bankrupt estate, was accepted by Petitioner and recorded (Pet. App. 33a; R. p. 310).

Thus Petitioner did nothing following adjudication to claim a lien upon rental income although he had ample opportunity to do so. In face of the requirements of Bankruptcy Rule 701 and the opportunity afforded him as a defendant in the adversary proceeding, the rulings of the Bankruptcy Judge and the Court of Appeals were correct (Fidelity Bankers v. Williams, 506 F2d 1242, (Fourth Circuit, 1974)).

II. The Supreme Court should not grant certiorari to resolve a split among the Circuits based on the facts of this case.

Petitioner correctly states that a split exists among the Circuits on the issue of the lien of a mortgagee to rents derived from mortgaged property during bankruptcy. Petitioner has not perceived, however, that the conflict, to the extent that it exists, involves situations where the mortgagee has suffered a loss by being denied possession of the property (4A Collier on Bankruptcy (14th ed.) pp. 167-169). Indeed, even in the Third and Seventh Circuits

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3 Interestingly Petitioner ultimately appealed the confirmation order of the bankruptcy judge on the sale of the real estate free of liens with liens transferred to the proceeds and another sale was ordered allowing Petitioner to buy the property in by using his mortgage debt to bid (Pet. App. 33a). No claim was made regarding the rents during that appeal either (R. 302-303).

(the rule that Petitioner urges the Court to adopt) the mortgagee must have suffered a loss or be in the position of needing equitable relief which is inherent in the bankruptcy court. [4]

In this case the record is clear that the property was worth more than Petitioner claims (R. p. 365-367) (R. p. 185-208). This fact in itself takes the case out of the ambit of the rule of the Third and Seventh Circuits. No authority cited by Petitioner would allow the mortgagee to recover rents when he has been made whole by obtaining the property worth more than his debt.

Finally, Respondents respectfully point out that Congress is presently drafting substantive amendments to the Bankruptcy Act and they argue that Congress is in a better position to deal with the problem. This is especially true in light of the authors' comments regarding the Erie Doctrine (4A Collier on Bankruptcy (14th ed.) pp. 169).

Thus, Respondents contend, the facts of this case do not merit review by the Court and Respondents respectfully request that the Petition for a Writ of Certiorari to the Fourth Circuit be denied.

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4 See a Second Circuit case interpreting the Third Circuit Rule, In Re Cigar Stores, 69 F2d 823 (1934); Also see 4A Colliers pp. 167-169.

CONCLUSION

For the reasons stated above it is respectfully submitted that the Petitioner has failed to sustain his burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted.

Thus, Respondents contend, the facts of this case do not merit review by the Court and Respondents respectfully request that the Petition for a Writ of Certiorari to the Fourth Circuit be denied.

J. CARROLL ABERNETHY, JR.
Attorney at Law
P. O. Box 1492
Hickory, NC 28601

JOE N. CAGLE
Attorney at Law
CAGLE AND HOUCK
Fidelity Federal Building
P. O. Box 2050
Hickory, NC 28601

JAMES M. GAITHER, JR.
Attorney at Law
GAITHER AND GORHAM
NCNB Building
P. O. Box 1650
Hickory, NC 28601

CERTIFICATE OF SERVICE

The undersigned hereby certifies that they have this day served a copy of the foregoing Brief For Respondents In Opposition To Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit by depositing copies of the same in the United States mail, postage prepaid, addressed:

Langdon M. Cooper
Trustee for Charles B. Camp
313 South Street
Gastonia, North Carolina 28052

Joseph H. Frier, Jr., Esquire
Goldman, Frier & Altesman
Seven Dey Street
New York, New York 10017

Carlton Powell
Tax Division Department of Justice
Washington, D. C. 20530

J. Richardson Rudisill, Jr.
J. Steven Brackett
Rudisill & Brackett
P. O. Box 3506
Hickory, North Carolina 28601

The Honorable Michael Rodak, Jr.
Clerk of Supreme Court of the United States
U. S. Supreme Court Building
One First Street, N. E.
Washington, D. C. 20543

Arthur I. Winard, Esquire
475 Fifth Avenue
New York, New York 10017

Solicitor General
Department of Justice
Washington, D. C. 20530

William E. Butner
P. O. Box 2323
Hickory, NC 28601

This the 17 day of May, 1978.

J. Carroll Abernethy, Jr.
Attorney at Law
P. O. Box 1492
Hickory, NC 28601

Joe N. Cagle
Attorney at Law
Cagle and Houck
Fidelity Federal Building
P. O. Box 2050
Hickory, NC 28601

James M. Gaither, Jr.
Attorney at Law
Gaither and Gorham
NCNB Building
P. O. Box 1650
Hickory, NC 28601